

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: HU/02826/2017**

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **On 5 June 2018** | **On 12 June 2018** |
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**Before**

**UPPER TRIBUNAL JUDGE WARR**

**Between**

**RW**

(ANONYMITY DIRECTION made)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: No appearance by or on behalf of the appellant

For the Respondent: Mr I Jarvis, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Jamaica who was born on 4 February 1975. There had been an application for an adjournment made shortly before the hearing which had been refused by an Upper Tribunal Judge who noted that the grant of permission had been notified to the appellant on 23 April 2018 and he had had sufficient time to arrange representation. An adjournment was not warranted in all the circumstances.

2. There was no appearance by the appellant before me and no explanation for his non-attendance. I considered the position under Rule 38. It was clear that the appellant had been notified of the date of the hearing and that it was in the interests of justice to proceed in all the circumstances. After the hearing and after the decision had been reserved an email was received by administrative staff at 16:20 from the appellant claiming he had difficulties with travelling and had not received a reply to his request for an adjournment. I noted that the appellant had previously made no reference to his travelling difficulties and had again left matters to the last moment. I saw no reason to revisit my decision.

3. The appellant has a lengthy immigration history. He arrived in the UK in 2002 and was served with notice as an illegal entrant. Further applications were made but the decision in this case relates to an application made on 18 March 2013 on human rights grounds on the basis of the appellant’s family and private life and on the basis of the appellant’s medical condition. This application was refused on 31 January 2017. The appeal from that decision forms the basis of the proceedings herein. The appellant claimed to have been in a relationship with a naturalised Eritrean national (Ms B) since September 2003. At the time of the Secretary of State’s decision it was stated that Ms B was pregnant.

4. The appeal came before a First-tier Judge on 8 February 2018. The appellant was then represented. By the time of the hearing the appellant’s daughter, M had been born and she is a British citizen. It was noted by the Presenting Officer that there had been a change of circumstances since the decision apart from the birth of the child. The appellant had separated from Ms B and was living at a distance from the child. It was difficult to assess the child’s best interests as there was no statement from her mother and there was no suggestion that the child should leave the UK as her mother was a British citizen. There were no ongoing legal proceedings and **RS (India) [2012] UKUT 00218 (IAC)** was not applicable in the circumstances. It was submitted that there was no family life between the appellant and the child and there were no insurmountable obstacles preventing the appellant’s return to Jamaica. Assistance was available for disabled people there. The appellant had been in the UK illegally and his former partner had been fully aware of his lack of status. He referred the judge to Section 117B of the Nationality, Immigration and Asylum Act 2002.

5. The First-tier Judge noted the many convictions recorded against the appellant – he had used at least six different names during the course of his criminal career. The judge took into account a letter that was unconfirmed by any other source that the appellant was having daily contact with his daughter. He noted that the appellant’s contact had been affected by his move to an area outside London following the breakdown of his relationship with his former partner, Ms B. It appeared that the local authority would require contact to be supervised and that might reduce the frequency of contact. There was an absence of evidence from Ms B. While the judge found some merit in the argument advanced by the Secretary of State that the presence of the appellant in the UK was not conducive to the public good because of his conduct, character and associations he observed at paragraph 39 as follows:

“Given the age of the Appellant’s convictions and the fact that he had not repeated such behaviour I find that the Respondent’s suggestion that he is not suitable to remain in the UK because of his convictions to be too harsh a view of the situation.”

6. It was argued that the appellant met the requirements for leave to remain under the parent route in Appendix FM (R-LTRPT). The determination concludes as follows:

“41. It did not seem to be in dispute that the daughter M is a British citizen. She was clearly under the age of 18 and living in the UK. Her mother is a British citizen.

42. It seemed to me, the letter from TV E made it clear that there was no contact taking place and it was not clear to me when that contact had ended. There was a suggestion that any future contact would have to be supervised but there was no indication as to when that contact might take place or how frequent that contact would be.

43. There was no indication to me that the mother would oppose contact and her views would be important. I was deeply concerned that there was no statement from her. If she were to oppose contact it could mean that there could be a substantial delay in the appellant re-establishing contact with his daughter.

44. In reaching my decision I had to take account of Section 55 of the Borders, Citizenship and Immigration Act 2009. That was difficult without background evidence regarding the mother’s situation and future intentions. However, I noted the age of the child and any relationship she had with her father would be in its very early stages.

45. Clearly, the child’s best interest was served by her remaining with her mother in the UK and it was not proposed by the Respondent that there should be any change to that.

46. I had a statement from Ms B but that was dated 9th January 2013 which was 5 years ago and it did not assist me much in dealing with the application before me. Given that Ms B was an Eritrean National who had applied for British citizenship I did not place much weight on her statement that she did not talk to the Appellant about his immigration status. I believe that that would have been something that was very much on her mind and I believe that she entered a relationship with him knowing full well what his immigration status was.

47. In any event, I was satisfied that at the time of the hearing before me there was no subsisting relationship between the Appellant and Ms B. She had set up a separate family unit with her child and in assessing the child’s needs I was of the view that it was reasonable for the child to remain in the UK without her father. I did not think that she would suffer significant damage if this took place. She would be able to contact her father as she grew older if she wished to maintain a relationship with him.

48. I agreed with Mr Williams that RS (India) did not apply as there were no outstanding family proceedings.

49. I also noted what was said in the headnote of Mohammed at page 13 of the Bundle that Mr Williams helpfully handed in.

50. There was no family life between the Appellant and Ms B and there had been some family life between the Appellant and his child until the relationship ended.

51. I did not think that the Respondent’s interference with family life was so disproportionate as to be unreasonable in the light of the need to maintain strict immigration controls. The public interest hurdle set a high barrier.

52. I went on to consider Paragraph 276ADE and whether there were insurmountable obstacles of the Appellant returning to Jamaica.

53. He had family in Jamaica.

54. It was clear from the background material that there were organisations in Jamaica who were able to assist people with disabilities.

55. There was a functioning health service (page 56 of the COI Report refers).

56. The Appellant had not shown that there was no housing available to him in Jamaica nor had he shown that he could not live with his family.

57. I had to take account of Section 117B and I do so in reaching my decision. I took account of the fact that the Appellant had been admitted to the UK on a visit visa and he had remained in the UK illegally since 2002. He had been served with an IS.151A on 6th December 2002 and had still remained in the UK for the last 15 years. He had shown scant regard for UK Immigration Rules.

58. Section 117B required that I give little weight to his time in the UK as it had been illegal, apart from the short initial visit.

59. I took account of the fact that the Appellant had committed offences whilst he was in the UK and used aliases when arrested.

60. I took account of the fact that the Appellant had been a drain on the NHS to which he had not contributed.

61. The Appellant had shown that he had been resourceful as he had managed to survive in the UK for many years without legal status and I believe that that resourcefulness would assist him to return to his home country of Jamaica.

62. He had an extended family who could support him and he had not made out a case to show that there were insurmountable obstacles to his resuming life in Jamaica. Having considered the public interest and the issue of proportionality I am of the view that the Respondent’s decision is proportional in the particular circumstances of this case. Given the age of M. I did not think that she would be affected to such an extent by the Respondent’s decision as to make it disproportionate.”

7. The judge dismissed the appeal under the Rules and under Article 8. There was an application for permission to appeal and permission was granted by a First-tier Judge on 12 April 2018. It was said the judge appeared to have made no finding that it would be reasonable for the child to leave the United Kingdom and did not appear to have considered the application of Section 117B(6) in the case.

8. Mr Jarvis submitted that the judge had taken into account the letter from T V Edwards. He had noted that the appellant had been relocated and there was an absence of evidence from his former partner. He had had to do his best under the circumstances given the lack of information about contact. In relation to 117B(6) it was submitted that 117B was only applicable if a public interest question arose but there was no family life in this case and accordingly the public interest question referred to in Section 117A did not arise. Mr Jarvis referred to Home Office guidance in relation to Appendix FM at page 73 under the heading, “will the consequence of refusal of the application be that the child is required to leave the UK?”. Where the parents’ departure would not result in the child being required to leave the UK because the child would remain living here with another parent “then the question of whether it is reasonable to expect the child to leave the UK will not arise. In these circumstances, paragraph EX.1.(a) does not apply.” Mr Jarvis submitted that the same considerations must apply to Section 117B(6). The child was not in contact with the appellant in any event. The appellant had a poor immigration history.

9. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the determination of the First-tier Judge if it was flawed in law. I have carefully considered the grounds and the submissions that had been made at the hearing and the documentary evidence. It is apparent that the judge had regard to all the evidence before him and, as Mr Jarvis put it, he did the best he could given the scant up to date material. He found that there was no subsisting relationship between the appellant and Ms B. The opportunity does not appear to have been taken to lodge further material in relation to the position of the child. The judge concluded that it was clearly in the child’s best interest to remain with her mother in the UK and further that that was not opposed by the Secretary of State. The grounds submit that the judge failed to consider the child’s best interests but this is not the case – he had those interests fully in mind. The only point picked up when permission to appeal was granted was the argument that the judge did not appear to have considered Section 117B(6).

10. In relation to this Mr Jarvis submitted that in keeping with Home Office guidance Section 117B(6) only came into play where there was an issue of the child leaving the UK. In this case there was no such issue. Clearly the judge had regard to Section 117B as he had been invited to do in the submissions that had been made before him. He had taken into account the appellant’s illegal status as required by Section 117B(4). It is plain from paragraph 46 of the decision that he did not accept that Ms B was unaware about the appellant’s immigration status. The relationship would be precarious within the meaning of Section 117B(5). As submitted by Mr Jarvis Section 117B(6) is drafted on the footing that it would not be reasonable to expect the child to leave the United Kingdom but in this case there is no question of the child leaving. In paragraph 47 the judge refers to the fact that the appellant’s former partner had set up a separate family unit with her child and the judge took the view in assessing the child’s needs that it was reasonable for the child to remain in the UK without her father. I do not find that it was necessary for the judge to make an express reference to Section 117B(6) in the particular circumstances of this case. He was entitled to conclude that the respondent’s decision was proportionate and that the public interest hurdle represented a high barrier for the reasons he gave. I accept the submissions made by Mr Jarvis that there was no material error of law in the judge’s approach and the appeal of the appellant is dismissed.

**Notice of Decision**

11. The appeal is dismissed.

**Anonymity Order**

12. It is appropriate to make an anonymity order in this case as a child is involved.

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

**Fee Award**

The First-tier Judge made no fee award and I make none.

Signed Date 11 June 2018

G Warr, Judge of the Upper Tribunal